CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 28

PETE DI GIOVANNI AND MARY DI GIOVANNI,
PETITIONERS,

vs.

CAMDEN FIRE INSURANCE ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 19, 1935.

CERTIORARI GRANTED MAY 20, 1935.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	A	1
Caption (omitted in printing)	A	
Record from D. C. U. S., Western Missouri	B	1
Citation and service (omitted in printing)	B	
Bill of complaint	1	1
Special motion to dismiss	5	5
Order sustaining motion to dismiss	5	6
Petition for appeal	6	6
Assignment of errors	6	7
Order allowing appeal	7	8
Election as to printing	7	8
Praecipe for transcript	8	9
Appeal bond (omitted in printing)	9	
Order extending time to file transcript	10	10
Memorandum opinion of the Court, Reeves, J.	10	10
Clerk's certificate to transcript (omitted in printing)	11	
Appearances of counsel (omitted in printing)	13	
Argument and submission (omitted in printing)	14	
Opinion, Gardner, J.	15	12

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—6499-C

	Original	Print
Decree	22	18
Motion to complete record	23	19
Petition for rehearing	26	20
Order denying motion of appellees to remit transcript of record to District Court, etc., and petition of appellees for rehearing	30	23
Motion to stay issuance of mandate	30	23
Order staying issuance of mandate	31	24
Clerk's certificate (omitted in printing)	32	
Order allowing certiorari	33	24

[fol. A] [Caption omitted]

[fol. B] Citation in usual form showing service on James Dale, filed April 12, 1934, omitted in printing.

[fol. 1] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

BILL OF COMPLAINT—Filed Dec. 21, 1933

To the Honorable the Judges of Said Court:

The Camden Fire Insurance Association brings this, its bill of complaint against Pete DiGiovanni and Mary DiGiovanni and thereupon complains and says:

1. The complainant, the Camden Fire Insurance Association, is a corporation duly organized and existing under and by the virtue of the laws of the State of New Jersey, and is a citizen and inhabitant of said State with its principal place of business in the City of Camden in said State.

2. That the respondents, Pete DiGiovanni and Mary DiGiovanni, are citizens and residents of the State of Missouri and reside in Kansas City, County of Jackson, in said State.

3. That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars.

4. That on the 15th day of May, 1933, the complainant issued and delivered to the respondents its certain policy of fire insurance, Number 910254, purporting to insure said respondents against all direct loss and damage by fire to an amount not exceeding Three Thousand ($3,000.00) Dollars, on the two story, brick building, as therein described and limited, situated at 1030 East 5th Street, in Kansas City, County of Jackson, and State of Missouri; a copy of which policy is filed herewith, made a part hereof, and marked "Exhibit A."

On the same date, to-wit, the 15th day of May, 1933, and as a part of the same transaction, the complainant is-

sued and delivered to the respondents its certain policy of fire insurance, Number 910156, purporting to insure said [fol. 2] respondents against all direct loss and damage by fire to an amount not exceeding Fifteen Hundred ($1,500.00) Dollars upon the contents of the premises, as in said policy described and limited, situated at 1030 East 5th Street, in Kansas City, Jackson County, Missouri; a true and correct copy of which policy is herewith filed, made a part hereof, and marked "Exhibit B."

5. That on the 26th day of May, 1933, the said respondents procured a policy in the sum of Two Thousand ($2,000.00) Dollars in the Eureka Security Fire and Marine Insurance Company, upon the building located at 1030 East 5th Street, Kansas City, Jackson County, Missouri, as hereinbefore described.

That upon the 13th day of May, 1933, said respondents procured through another agency, a policy in the Eureka Security Fire and Marine Insurance Company, upon said building, in the sum of Two Thousand Five Hundred ($2,500.00) Dollars, and that upon the 13th day of May, 1933, said respondents procured from the St. Louis Fire and Marine Insurance Company, a policy in the sum of Two Thousand Five Hundred ($2,500.00) Dollars upon said building; that upon the 5th day of April, 1933, the said respondents procured from the Old Colony Insurance Company a policy in the sum of Five Thousand ($5,000.00) Dollars upon said building, all of which said policies were fire insurance policies; that upon the 5th day of April, 1933, said respondents procured from the Old Colony Insurance Company an explosion policy in the sum of Five Thousand ($5,000.00) Dollars upon said building.

That on the 5th day of April, 1933, the said respondents procured from the Eureka Security Fire and Marine Insurance Company a policy in the sum of One Thousand ($1,000.00) Dollars, upon the contents located in said building, and upon the 5th day of April, 1933, procured a policy in the Old Colony Insurance Company in the sum of Three Thousand Two Hundred ($3,200.00) Dollars upon the contents located in said building, both of which said policies were fire insurance policies.

6. That shortly subsequent to the procurement of said policies as hereinbefore outlined, and to-wit, on the 13th

day of June, 1933, at about twelve-twenty A. M., a fire occurred in said building. Complainant states that the policies hereinbefore named were procured from different agencies; that complainant had no knowledge of the issuance of the other policies herein named until after the fire. Complainant alleges that the said building was of a value not to exceed Six Thousand ($6,000.00) Dollars. Complainant states that all of the aforesaid policies were procured by respondents as a part of a general scheme and plan to [fol. 3] defraud this complainant and the other insurance companies named, and that in furtherance of said plan, the said respondents by and through their servants and agents, caused the said property to be set fire to on said date; that the said respondents procured insurance far in excess of the value of the building and its contents from different agencies, as a part of their general plan and scheme to defraud this said complainant and the other insurance companies, and in order that the respondents might set fire to the property and collect an exorbitant price for the building and its contents; that the said respondents represented to certain of the companies hereinbefore named, and to this complainant that they would not procure in excess of Five Thousand ($5,000.00) Dollars insurance on said building and that they would not procure in excess of Three Thousand Two Hundred ($3,200.00) Dollars insurance upon the contents; that the procurement by the respondents of the aforesaid policies and all of them, from different agencies, was done by the said respondents for the purpose of misleading complainant and the other insurance companies named, and as a part of the general scheme and plan of respondents to burn their property and collect a large sum of money; that immediately following this fire, complainant began an investigation of said fire loss, and has ascertained the facts hereinbefore set forth.

7. That the said respondents have filed proof of loss against all of said companies, claiming a total loss, although said loss was not total, and that they have threatened to sue complainant upon the two policies issued by complainant as hereinbefore set forth, to recover the face amount of said policies.

8. That the complainant has denied liability upon said policies of fire insurance, by reason of the matters and

things hereinbefore averred, and has tendered to the respondents the amount of the premiums paid by respondents for said policies, together with legal interest thereon, from the date of the payment of said premiums, and still tenders to said respondents said premiums and interest, which said tender is renewed herein.

9. That it is the intention of the respondents to use the two said policies of fire insurance issued by complainant as a means of consummating the said fraudulent purpose, scheme, and plan of the said respondents, in procuring said policies, and unless restrained by your honorable court, will institute two actions at law against complainant on said policies of fire insurance in an effort to consummate said fraud.

That title to said real property stands in the name of Pete DiGiovanni and Mary DiGiovanni, husband and wife, [fol. 4] as an estate by the entirety; that complainant has no plain, complete and adequate remedy at law, in that in an action at law, complainant would have the burden of establishing that both respondents participated in the matters and things complained of herein.

Wherefore, needing equitable relief, complainant prays:

1. That a writ of subpoena issue directed to the respondents commanding them, at a certain day, to be and appear before your Honorable Court, and then and there to answer all and singular the premises, and to abide such order and decree therein, as to your Honorable Court shall seem meet.

2. That it be decreed that the policies of fire insurance dated the 15th day of May, 1933, and Numbered 910254 and 910156, referred to in the foregoing bill of complaint, are null and void.

3. That the respondents, their agents, servants, attorneys, and representatives, and each of them, be restrained temporarily until hearing, and permanently thereafter, from instituting any suit upon said policies of fire insurance.

4. That the respondents be ordered and directed to deliver up and surrender to the complainant the said policies of fire insurance, dated June 15th, 1933, and numbered 910254 and 910156 upon payment to them by complainant of the premium paid therefor, with interest.

5. That your complainant may have such further and other relief in the premises as may be just and proper and the equities of the case may require.

Hume & Raymond, Attorneys for Complainant.

Duly sworn by Fenton Hume. Jurat omitted in printing.

[fol. 5] IN UNITED STATES DISTRICT COURT

SPECIAL MOTION TO DISMISS—Filed Jan. 10, 1934

Come now the defendants Pete DiGiovanni and Mary DiGiovanni, appearing specially for the purposes of this motion and for no other purpose whatsoever, and not submitting to the jurisdiction hereof, and move the Court to dismiss the Bill of Complaint filed in the above entitled suit for insufficiency of facts to constitute a valid cause of action in equity against these defendants either severally or jointly in the following respects:

First: It appears from plaintiff's bill that this Court has no jurisdiction to hear and determine this cause.

Second: The bill does not state facts sufficient to constitute a cause of action in equity against these defendants either severally or jointly.

Third: It appears by the plaintiff's bill that it is not entitled to the relief prayed for or any relief herein.

Wherefore, these defendants and each of them, without waiving their right to object to the jurisdiction of this Court, and appearing specially for the purposes of the foregoing motion, and for no other purpose whatsoever, move that the Bill of Complaint in the above entitled cause be dismissed for insufficiency of fact to constitute a valid cause of action in equity against these defendants or either of them, and particularly for the reasons and in the respects aforesaid in this motion and each of them.

James Daleo, Attorney for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION TO DISMISS—Filed March 30, 1934

Now on this day this cause coming on regularly for hearing upon respondents' motion to dismiss complainant's bill in equity and the parties appearing herein by their respective counsel and the court having seen and heard said motion and being fully advised does sustain said motion to which complainant then and there excepted and still excepts.

It is therefore ordered, adjudged and decreed by the court that the respondents, Pete Di Giovanni and Mary Di Giovanni, go hence without day and that the costs of this action be taxed against the complainant and complainant is given 40 days within which to file bill of exceptions and transcript in the Circuit Court of Appeals.

March 28, 1934.

Albert L. Reeves, Judge.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 30, 1934

Now comes Camden Fire Insurance Association, a corporation, by its attorneys, Fenton Hume and Walter A. Raymond, and respectfully shows to the court that on the 28th day of March, 1934, the court sustained respondents' motion to dismiss your petitioner's complaint and entered a final judgment on said 28th day of March, 1934, against your petitioner, Camden Fire Insurance Association, fully discharging the respondents, Pete Di Giovanni and Mary Di Giovanni, and taxing the costs of such action against your petitioner, to which action of the court your petitioner then and there excepted and still excepts;

Complainant further states that in said proceedings, judgment and order, certain errors were committed to the prejudice of the complainant all of which more fully appear in detail in the assignment of errors which is filed with this petition;

Wherefore, the premises considered, your petitioner prays that an appeal be allowed in its behalf to the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of the errors complained of, and that an order be made fixing the amount of security to be given by the complainant conditioned as the law directs, and upon giving such bond as may be required that all further proceedings shall be suspended until the determination of such appeal and assignment of errors by the Circuit Court of Appeals, and that a transcript of the record proceedings and the papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

Fenton Hume, Walter A. Raymond, Hume & Raymond, Attorneys for Complainant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed March 30, 1934.

Now comes the Camden Fire Insurance Association, a corporation, complainant in the above numbered and entitled cause and in connection with its petition for appeal in this cause assigns the following errors, which complainant avers occurred in the trial and hearing thereof, upon which it relies to reverse the judgment entered as appears of record:

1. The court erred in holding the jurisdictional amount was not involved to give the court jurisdiction of the cause of action stated in the complaint herein;

[fol. 7] 2. The court erred in holding that the amount of insurance specified in each of the policies described in the complaint could not be aggregated on the issue of the amount involved necessary to give the court jurisdiction;

3. The court erred in holding the complaint did not contain allegations sufficient to raise the issue of a fraudulent conspiracy between the respondents to defraud the complainant which would render operative the rule of law that the several sums specified may be aggregated in case of

such fraudulent conspiracy for the purpose of determining whether the jurisdictional amount exists;

4. The court erred in holding the issues involved with reference to the policies mentioned in the complaint were so different and divergent that the same could not be properly joined in the same bill in equity;

5. The court erred in holding he did not have jurisdiction because the rights of action on said policies described in the complaint were several and could not be joined in a single bill in equity;

6. The court erred in holding respondents were not properly joined as parties respondent in the complaint herein;

Wherefore, complainant prays that the judgment of the court be reversed and the cause be remanded for a new trial.

Hume & Raymond, Attorneys for Complainant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed March 30, 1934

It is ordered by the court that an appeal be, and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit the order and judgment heretofore rendered herein and that the amount of the supersedeas bond be fixed in the sum of Five Hundred Dollars ($500.00).

March 28, 1934.

Albert L. Reeves, United States District Judge.

IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING—Filed March 30, 1934

To the Clerk of the United States District Court for the Western Division of the Western District of Missouri:

[fol. 8] You are hereby notified that the complainant, Camden Fire Insurance Association, a corporation, hereby

elects to take and file in the United States Circuit Court of Appeals for the Eighth Circuit a transcript of the record requisite for the hearing of said cause, which said transcript of record shall be printed under the supervision of the clerk of the United States District Court at Kansas City, Missouri.

Hume & Raymond, Attorneys for Complainant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed April 12, 1934

To A. L. Arnold, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri:

Please prepare transcript in the above entitled cause for filing in the United States Circuit Court of Appeals for the Eighth Circuit and include in the same the following:

1. Bill in equity.
2. Motion to dismiss bill in equity.
3. Order and judgment of the court dismissing bill in equity.
4. Memorandum opinion of the court filed in connection with the order sustaining the motion to dismiss bill in equity.
5. Petition for appeal filed in said cause.
6. Assignment of errors filed by appellant in said cause.
7. Order of court allowing appeal in said cause.
8. Citation.
9. Supersedeas bond and order of approval of the same.
10. All orders made in the above entitled cause by the court.
11. Præcipe for transcript of record in said cause.
12. Election as to printing.
13. Orders of court extending time for filing transcript.

Hume & Raymond, Attorneys for Complainant.

Received copy of the above and foregoing Præcipe for Transcript this 4th day of April, 1934.

James Daleo, Attorney for Respondent.

[File endorsement omitted.]

[fol. 9] Bond on appeal approved and filed April 13, 1934, omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed May 8, 1934

Upon application of the plaintiff and for good cause shown, it is ordered that the time for filing the transcript of the record in the United States Circuit Court of Appeals for the 8th Circuit be and is hereby extended to on or before August 1st, 1934.

May 7, 1934.

Albert L. Reeves, Judge of the United States District Court, Western Division of the Western District of Missouri.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION OF THE COURT

This is a motion to dismiss complainant's bill. Complainant filed its bill in equity against the two defendants. By said bill the complainant sought to cancel two policies or contracts of fire insurance, one in the sum of $3,000, and the other in the sum of $1,500. The former insured a building owned by the two defendants; the latter insured personal property owned solely by Pete Di Giovanni, one of the defendants.

It is the contention of the defendants that this court is without jurisdiction for the reason that the amount in controversy does not exceed $3,000. Section 41, Title 28, U. S. Code relates to the jurisdiction of Federal Courts. It is there provided, among other things, that the district courts shall have original jurisdiction, "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000."

In the case at bar, the suit to cancel the policy against the two defendants issued upon the building equals but does

not exceed $3,000, and standing alone would be insufficient to confer jurisdiction upon the court. The suit to cancel the policy upon the personal property is against Pete Di Giovanni alone.

The only question, therefore, is whether this sum could, under the circumstances, be added to the prior figure so as to secure an aggregate of more than $3,000. The rule is practically universal that this can only be done where the parties are the same.

In Woodmen of the World vs. O'Neill, et al., 266 U. S. 292, l. c. 295, the Supreme Court announced the true rule when it said,

"It is the settled general rule * * * that in a suit based on diversity of citizenship brought against several defend-
[fols. 11 & 12] ants to enjoin the collection of claims against the plaintiff which are separate and distinct—although depending for their validity upon a common origin—the test of jurisdiction is the amount of each separate claim, and not their aggregate amount."

On the same page, the Court mentioned the exception recognized in McDaniel vs. Traylor, 196 U. S. 415, l. c. 427, but the court was careful to say that this exception was recognized upon the claim of a conspiracy, thereby bringing all of the parties into a common purpose.

The allegations of the bill in this case do not bring it within the exception.

In Georgia Power Co. vs. Hudson, et al., 49 Fed. (2d) 66, l. c. 68, the Court of Appeals for the Fourth Circuit had before it a somewhat similar situation. It was there pointed out that several "claims are entirely separate and distinct from each other; and, as stated, there is no allegation of fraudulent conspiracy, such as was held to justify considering such claims in the aggregate for the purpose of jurisdiction in Woodmen of the World vs. O'Neill, 266 U. S. 292."

The rule is also stated to the same effect in 27 R. C. L. Section 35, page 33.

In the instant case the policy upon the personal property is a separate and distinct contract from that on the buildings. The measure of proof and recovery are made different by statute, and, moreover, assured under the policy on the personal property is different from the assured on the policy on the real estate.

In view of the above, the Federal District Court is without jurisdiction for the reason that the amount in controversy is insufficient, and, accordingly, the bill will be dismissed.

It is so ordered.

Albert L. Reeves, United States District Court.

Kansas City, Missouri, March 28, 1934.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 13] Appearances of Counsel omitted in printing.

[fol. 14] Minute entry of argument and submission, Dec. 11, 1934, omitted in printing.

[fol. 15] In United States Circuit Court of Appeals, Eighth Circuit, November Term, A. D. 1934

No. 10,062

Camden Fire Insurance Association, a Corporation, Appellant,

vs.

Pete Di Giovanni and Mary Di Giovanni, Appellees

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Walter A. Raymond (Messrs. Hume & Raymond and Mr. Fenton Hume were with him on the brief), for Appellant.

Mr. James Daleo for Appellees.

Before Gardner, Sanborn, and Van Valkenburgh, Circuit Judges

Opinion—February 14, 1935

Gardner, Circuit Judge, delivered the opinion of the court:

This is a suit in equity brought by appellant, Camden Fire Insurance Association, seeking the cancellation of two

fire insurance policies. Appellees, defendants below, are husband and wife. One of the insurance policies involved is for $3,000.00 and covers a two-story brick building owned [fol. 16] by both defendants, while the other policy is for $1500.00 and covers personal property owned solely by the defendant Pete Di Giovanni, and both the policies insure against loss and damage by fire.

After alleging the issuance of these policies, it is alleged in the bill of complaint that at about the same time defendants produced a policy of fire insurance in the Eureka Security Fire and Marine Insurance Company upon this same building for $2500.00, and one from the St. Louis Fire and Marine Insurance Company for $2500.00, and one from the Old Colony Insurance Company for $5,000.00; also that they procured additional insurance upon the contents of the building, one policy from the Eureka Security Fire and Marine Insurance Company for $1,000.00, and one policy from the Old Colony Insurance Company for $3200.00; that shortly after procuring these policies, and on the 13th of June, 1933, a fire occurred in the building; that all of the policies were procured from different agencies; that the plaintiff had no knowledge of the issuance of the other policies until after the fire; that the building was of a value not to exceed $6,000.00. It is then alleged that, "all of the aforesaid policies were procured by respondents as a part of a general scheme and plan to defraud this complainant and the other insurance companies named, and that in furtherance of said plan, the said respondents by and through their servants and agents, caused the said property to be set fire to on said date; that the said respondents procured insurance far in excess of the value of the building and its contents from different agencies, as a part of their general plan and scheme to defraud this said complainant and the other insurance companies, and in order that the respondents might set fire to the property and collect an exorbitant price for the building and its contents; that the said respondents represented to certain of the companies hereinbefore named, and to this complainant that they would not procure in excess of Five Thousand ($5,000.00) Dollars insurance on said building and that they would not procure in excess of Three Thousand Two Hundred ($3,200.00) Dollars insurance upon the contents; that the procurement by the respondents of the aforesaid policies and all of them, from different agencies, was done by

the said respondents for the purpose of misleading complainant and the other insurance companies named, and as a part of the general scheme and plan of respondents to burn their property and collect a large sum of money; that [fol. 17] immediately following this fire, complainant began an investigation of said fire loss, and has ascertained the facts hereinbefore set forth."

It is then alleged that defendants have filed proof of loss against all of said insurance companies, claiming the total loss, although the loss was not total, and they have threatened to sue complainant upon the two policies issued, to recover the face amount of the policies; that complainant has denied liability, after tendering the premiums paid, together with interest thereon; that it is the intention of defendants to use these policies as a means of consummating their fraudulent scheme, and that unless restrained they will institute two actions at law against complainant on these two policies; that title to the real estate stands in the name of Pete Di Giovanni and Mary Di Giovanni, husband and wife, as an estate by the entirety. Complainant prays for a decree declaring the policies void, and restraining the defendants from instituting suits thereon, and for a delivery of the policies to complainant upon the payment of the premiums and interest.

To this complaint, defendants filed a motion to dismiss on the ground that the court had no jurisdiction, that the bill did not state facts sufficient to constitute a cause of action in equity against defendants, either severally or jointly, and that it appeared from the bill that complainant was not entitled to any relief. This motion was sustained, and from the judgment of dismissal entered, the plaintiff prosecutes this appeal.

Appellees insist that the lower court was without jurisdiction, and hence, properly dismissed the bill of complaint, because the matter in controversy does not exceed the value of $3,000.00. Title 28, Sec. 41, U. S. C. A. Neither of the policies sought to be cancelled exceeds the amount of $3,000.00, and the policy covering the contents of the building was issued to defendant Pete Di Giovanni, although both defendants are alleged to have acted jointly and pursuant to their general scheme and plan to defraud plaintiff in securing same. The general rule is that jurisdiction cannot be conferred upon the federal court by joining claims against distinct and separate defendants, no one of

which equals the jurisdictional amount. First State Bank v. Chicago, R. I. & P. R. Co. (CCA8) 63 Fed. (2d) 585, and cases there cited. But it is contended by appellant that the [fol. 18] claims which the defendants threatened to assert against it are so tied together, by reason of the alleged conspiracy and concerted design, as to entitle it to aggregate these claims for the purpose of maintaining this suit in equity in the federal court.

The complaint charges a concerted design and purpose on the part of the defendants to defraud the plaintiff and other insurance companies, by taking out an exorbitant amount of insurance and then deliberately destroying the property for the purpose of creating apparent liability on the part of the plaintiff in the nature of claims for loss by fire, and both these policies were secured through the concerted action of defendants. We think the allegation of fraudulent combination and concerted design and action constituted a conspiracy which tied together the claims and made the aggregate of the claims the matter in dispute. Woodmen of the World v. O'Neill 266 U. S. 292; McDaniel v. Traylor 212 U. S. 428; Packard v. Banton 264 U. S. 140; First State Bank v. Chicago, R. I. & P. R. Co. (CCA8) 63 Fed. (2d) 585; Premier Malt Products Co. v. Ackerman Printing Co. (CCA7) 24 Fed. (2d) 89; Western Real Estate Trustees v. Hughes (CCA8) 172 Fed. 206; United States v. Charpentier (CCA2) 54 Fed. (2d) 361; Rogers v. Virginia-Carolina Chemical Co. (CCA3) 149 Fed. 1; Fernandina Shipbuilding and Dry Dock Co. v. Peters 283 Fed. 621; Mitchell Woodbury Corp. v. Albert Pick Barth Co. (CCA1) 41 Fed (2d) 148.

In Woodmen of the World v. O'Neill, supra, suit was brought in equity against twenty-five individuals, charging them with entering into a conspiracy to have themselves elected delegates to a session of the Sovereign Camp of the Woodmen of the World, where it was decided they had not been legally elected; that pursuant to said agreement they instituted twenty-five different suits in a local court in Texas to recover amounts ranging from $987.00 to $1170.00, as per diem and mileage for attending at the Sovereign Camp. An injunction was asked against the defendants. They moved to dismiss the bill on the ground that the amount involved was not sufficient to give jurisdiction based solely on diversity of citizenship. In denying this contention, the court, speaking through Mr. Justice Sanford, said:

"We find that under the allegations of the present bill the case comes fairly within the reason of the exception recognized in the McDaniel cases. It is not only alleged [fol. 19] that the defendants' claims are without foundation, but that they originated and are being prosecuted in the state court in pursuance of an agreement and conspiracy to embarrass and attempt to ruin the Society. There is no dispute as to the amount of any particular claim; and the validity of all of them depends upon the same issue. A conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him, partakes of the nature of a fraudulent conspiracy; and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed to tie together such several claims as one claim for jurisdictional purposes, making their aggregate amount the value of the matter in controversy."

In the instant case, as the court dismissed the bill on motion, we must accept all the well pleaded allegations of the bill of complaint as true.

In First State Bank v. Chicago, R. I. & P. R. Co., supra, this court, in an opinion by the late Judge Kenyon, said:

"Plaintiff is asking for a determination of the validity of these fourteen claims and relief from the expense and vexation of having to defend a multiplicity of suits. The action is to cancel, not one of the bills of lading, but all of them. The necessary result of the litigation, were plaintiff successful, would be to cancel a claimed indebtedness of $31,400.00. That is the amount in dispute and in controversy between appellant and appellee in this case. We are satisfied the requisite jurisdictional amount exists."

So, in the instant case, plaintiff is seeking to cancel these policies on which, should the defendants successfully maintain actions at law, they will recover $4500.00, and in the circumstances of this case, the allegations of the bill of complaint being admitted, we think that is the amount in dispute and in controversy between the parties.

The right to maintain an equitable suit to rescind and cancel a contract of insurance because of fraud in securing its execution is well settled by a wealth of authority. New York Life Insurance Co. v. Miller (CCA8) 73 Fed. (2d) 350, and cases there cited.

But it is urged that the plaintiff has a plain, adequate, and complete remedy at law, in that the defense of fraud [fol. 20] is available to it in any actions at law that may be brought upon these policies, and there is undoubtedly authority sustaining this contention in the abstract; in fact, we have so held in New York Life Insurance Co. v. Miller, supra. See, also: Enelow v. New York Life Ins. Co. (U. S. Sup. Ct. Opin. No. 47, handed down Jan. 7, 1935—not yet reported). There are, however, additional circumstances in the present case which may distinguish it from the authorities cited. In the first place, in this case there is a charge of conspiracy, and there are at least two of these policies, so that it would require at least two actions at law and materially increase plaintiff's expenditures in litigation, whereas, the matter, if cognizable in equity, can be disposed of in one suit.

But there is still a further answer to this contention. The adequate remedy at law which will prevent the maintenance of a suit in equity in the federal court is a remedy at law available in the federal court. Henrietta Mills v. Rutherford County 281 U. S. 121; Smyth v. Ames 169 U. S. 466; Risty v. Chicago, R. I. & P. R. Co. 270 U. S. 378; Munn v. Des Moines Natl. Bank (CCA8) 18 Fed. (2d) 269; Chicago & N. W. Ry. Co. v. Railroad & Warehouse Commission 280 Fed. 387.

Considered as law actions, the claims of the defendants are separate, and the amount in controversy cannot be aggregated, so that the plaintiff can secure no remedy at law in the federal trial court, nor indeed, would an appeal lie from the ultimate decision of the State Supreme Court to the Supreme Court of the United States, because there is no federal question involved, and the parties are private parties.

It must be borne in mind too that there is here no question involving an interference with the officers of a state in attempting to enforce state revenue laws, nor can it be urged that plaintiff should be required to pursue some legislative remedies, and this, we think, distinguishes this case from the doctrine of Matthew v. Rodgers, 284 U. S. 521 and Porter v. Investors Syndicate 286 U. S. 461.

Plaintiff being free to seek its remedy in the federal court, has a right to insist that the remedy at law which will preclude its right to maintain this suit in equity shall

be a remedy in the federal court. It follows that the court was in error in concluding that it did not have jurisdiction, [fol. 21] and the judgment appealed from is therefore reversed, and the cause is remanded for further proceedings consistent herewith.

[fol. 22] In United States Circuit Court of Appeals, Eighth Circuit

No. 10062

Camden Fire Insurance Association, a Corporation, Appellant,

vs.

Pete Di Giovanni and Mary Di Giovanni

Decree—February 18, 1935

Appeal from the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, reversed with costs; and that the Camden Fire Insurance Association, a Corporation, have and recover against Pete Di Giovanni and Mary Di Giovanni the sum of —— Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court filed herein February 14, 1935.

February 18, 1935.

[fol. 23] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

MOTION TO COMPLETE RECORD—Filed March 14, 1935

Now come appellees and move the court to remit the transcript of the record to the district court below, authorizing and directing said district court to cause to be incorporated in said transcript of record, by way of supplemental [fol. 24] record or otherwise, Exhibits A and B referred to in appellant's original bill of complaint and by reference incorporated in said bill as a part thereof, said transcript of record with said amendment or supplement to be returned to this court and filed with the clerk thereof within thirty days from the date of this order.

As reasons for said motion, appellees state that certain portions of said exhibits, being the insurance policies issued by appellant company to appellees, have become material and important in the determination of said appeal, particularly those provisions of said exhibits and insurance policies which provide that other insurance may be carried on the property, and that, if other insurance is so carried in case of loss, the appellant insurance company shall be liable only for its proportionate part of the entire loss. The materiality and importance of these provisions are set out more fully in appellees' motion for rehearing and argument in support thereof, filed concurrently herewith in this court. The transcript of record as now filed in this court, prepared under the direction of appellant, fails to include said Exhibits A and B referred to in its bill.

James Daleo, Attorney for Appellees.

[fol. 25] SUGGESTIONS IN SUPPORT OF MOTION TO COMPLETE RECORD

The propriety of and the authority for an order of this court completing the record as prayed for in the motion—even when first suggested on motion for rehearing—are fully sustained by the following rules and authorities:

"If, at the hearing, it shall appear that any material part of the record has not been printed, the court may make

such order (including dismissal of the appeal) as may seem proper."

Rule 23 of this Court.

"If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript."

Federal Equity Rule 76.

See also:

Fairbanks, Morse & Co. et al. v. American Valve & Meter Co. et al., 276 U. S. 305, 48 S. Ct. 317.

Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., 275 U. S. 372, 48 S. Ct. 183.

Hobbs v. National Bank of Commerce of Kansas City, 93 Fed. 615 (C. C. A. 2).

Respectfully submitted, James Daleo, Attorney for Appellees.

Harry L. Jacobs,
Of Counsel.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed March 14, 1935

Appellees move the court to grant a rehearing herein because of material matters of law and fact inadvertently overlooked by the court, as shown by its opinion:

[fol. 27] I

Even if the claims on the two policies issued by complainant are tied together, still the amount involved is less than the jurisdictional amount of $3,000.00. The court inadvertently overlooked this fact in ruling that $4,500.00, the amount of the two policies, was the amount involved. The actual amount affirmatively appears from complainant's own bill to be only $2,700.00. This is so because the bill alleges policies of fire insurance on the building in various

companies, including the complainant, total $15,000.00. Complainant's policy was for only $3,000.00. Consequently, complainant was liable for only one-fifth of the loss. Inasmuch as complainant's bill affirmatively discloses the fact to be that the total value of the building was only $6,000.00, the actual amount involved in the controversy, so far as complainant is concerned, is one-fifth of $6,000.00, or $1,200.00. The amount of complainant's policy on the personalty was $1,500.00. Adding the $1,200.00 and the $1,500.00 together, the total amount actually involved, according to complainant's own bill, is $2,700.00.

II

The court inadvertently overlooked the fact, which affirmatively appears from the complainant's bill, that the building was not a total loss. Inasmuch as the building was not a total loss, then the actual amount or extent of the partial loss is all that complainant could possibly be liable for under its policy on the building. The amount of this loss might be a few dollars or a few hundred dollars. Complainant's bill fails to show the amount of the partial loss. It was incumbent on complainant to affirmatively show that the jurisdictional amount of $3,000.00 was involved. Inasmuch as the full amount of the policy on the personalty was only $1,500.00, and inasmuch as there was not a total loss under the policy on the building, it does not affirmatively appear that $3,000.00 was involved.

[fol. 28]

III

The court inadvertently overlooked the rule of law that where the "great object" of a bill in equity is to prevent suits in state courts, the bill does not state a cause of action for equitable relief, if the matters averred in the bill may be set up as a complete defense to the threatened suits at law in the state court, if such threatened suits are cognizable only by the state courts. The reason for this is that, in such event, no injury is threatened by such suits, and, consequently, there is no occasion for equity to interfere.

IV

In ruling that there was equitable jurisdiction because of a multiplicity of suits, the court inadvertently overlooked the fact that in each of the two insurance policies issued by complainant, the appellee, Pete Di Giovanni,

was one of the parties insured. Consequently, if the suit on the realty, in which the husband and wife, Pete Di Giovanni and Mary Di Giovanni, were the insured, were tried first, that judgment would be res judicata in the suit on the policy involving the personalty wherein Pete Di Giovanni would be the sole plaintiff. On the other hand, if the suit by Pete Di Giovanni on the policy involving the personalty were tried first, that would be res judicata against Pete Di Giovanni in the later suit brought by himself and his wife on the policy involving the realty. Inasmuch as the policy on the building was issued jointly to Pete Di Giovanni and his wife and they held same as tenants by the entirety, holding as one, the binding effect of the first judgment in Pete Di Giovanni's case would prevent recovery in the second case, because there could be no recovery by the tenants by the entirety unless both could sustain the right to recover. This is an incident of estates by the entirety and is the risk the wife took in accepting title as an owner by the entirety.

Moreover, in order to even reason that there was danger of a judgment being first rendered in the suit by Pete [fol. 29] Di Giovanni alone on the policy involving the personalty, which might not be res judicata against his wife in the later suit involving the building, this court necessarily had to assume that the suit on the personalty policy would be tried first. There is no allegation to that effect, nor is there any reason for so inferring. The mere possibility of a multiplicity of suits is not enough. It must appear that there will be a multiplicity of suits. It will be time enough to file a bill in equity when it appears that the suit on the personalty policy is about to be tried first. Jurisdiction of a federal court must affirmatively and distinctly appear, and cannot be eked out by surmise, presumption or inference drawn from the pleadings.

In view of our theory that the claims could not be tied together, the matters raised in this motion for rehearing were not presented and argued. We submit that they are serious and that a rehearing should be granted to the end that same may be fully briefed and argued to the court.

Wherefore, appellees pray a rehearing to the end that justice may be done between the parties.

James Daleo, Counsel for Appellees.

Harry L. Jacobs,
Of Counsel.

Certificate of Counsel

James Daleo, counsel for appellees in this suit, states that he has prepared the petition for rehearing and brief in support of same on behalf of appellees, and that the petition for rehearing is not filed for delay, but is filed in good faith and solely because in his opinion it is well founded in law and should be granted.

James Daleo, Counsel for Appellees.

[fol. 30] [File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Motion of Appellees to Remit Transcript of Record to District Court, etc., and Petition of Appellees for Rehearing—March 18, 1935

The motion filed by counsel for appellees to remit the transcript of the record in this cause to the District Court with directions that there be incorporated therein certain policies of insurance, Exhibits "A" and "B" referred to in appellant's original bill of complaint, and the petition for rehearing filed by counsel for appellees, having been considered, it is now here ordered by this Court that the said motion and petition, be, and they are each hereby, denied.

In United States Circuit Court of Appeals

Motion to Stay Issuance of Mandate—Filed March 23, 1935

Now come appellees and move the court to withhold the Mandate in this case for such time as may be fixed by the court in order that appellees may be afforded ample opportunity to prepare the necessary transcript of the record, petition for certiorari and brief in support thereof in the Supreme Court of the United States.

In this connection appellees represent that they intend, in good faith, to proceed to apply to the Supreme Court of the United States for the Issuance of Writ of Certiorari [fol. 31] with all due and reasonable diligence.

Wherefore, appellees pray the order of court.

James Daleo, Counsel for Appellees.

Harry L. Jacobs,
Of Counsel.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—March 23, 1935

On Consideration of the motion of appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,514. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 28. Pete Di Giovanni and Mary Di Giovanni, Petitioners, vs. Camden Fire Insurance Association. Petition for a writ of certiorari and exhibit thereto. Filed April 19, 1935. File No. 28 O. T., 1935.